



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00BJ/HMG/2022/0012**

**HMCTS code
(paper, video,
audio)** : **Face to Face**

Property : **Flat 1, 51A Nimrod Road, London SW16
6SZ**

Applicant : **Ms Jessica Williams**

Representative : **Mr A Nicholson (friend)**

Respondent : **Mr Usman Majeed**

Representative : **Mr A Dymond, counsel**

Type of application : **Rent repayment order**

**Tribunal
member(s)** : **Judge Tagliavini
Ms J Mann MCIEH**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of hearing : **30 January 2023**
Date of decision : **13 February 2023**

DECISION

The tribunal's summary decision

(1) The application for a rent repayment order is refused.

The application

1. The applicant seeks a rent repayment order in the sum of £8,400 for the period 20 December 2020 to 20 December 2021 ('the relevant period') pursuant to section 72(1) of the Housing Act 2004 for the failure to obtain a HMO licence under section 43(1) of the Housing and Planning Act 2016.

Background

2. By a written tenancy agreement dated 1 December 2020, the applicant entered into an assured shorthold tenancy with David Onafeko for the exclusive use of an ensuite bedroom with shared use of the kitchen and bathroom with the other occupiers of the ground and basement flat situated at 51A Nimrod Road, London Sw16 6SZ ('the Property') for a 12 months period. The rent of £800 per month (reduced to £700 per month) if paid in six monthly intervals was inclusive of utilities.
3. The respondent is the freehold owner of 51A Nimrod, a house converted into two flats together with his brother Mr Abdul Razak Majeed under registration number SGL127417 and is the long leaseholder of the ground/basement flat (the Property) with his wife Mrs Sadia Majeed under registration number SGL320455.

The issues

4. The parties identified the following issues to be determined by the tribunal:
 - (i) Who is the landlord and who had control and management for the purpose of a rent repayment order?
 - (ii) How many bedrooms were in the property during the relevant period?
 - (iii) What was the number of occupiers and the dates of their occupation during the relevant period. Did the occupiers occupy the property as their only or main residence.
 - (iv) What is the amount in which a rent repayment order, if any, should be made?
5. It was not disputed by the parties that the Property had to be occupied by five or more persons living in two or more households with shared use of basic amenities in order for the Property to require a licence as a

HMO from the London Borough of Wandsworth; section 254(2)(3) of the Housing Act 2004.

The hearing

6. The tribunal was provided with a bundle of documents of 141 pages, written submissions from the applicant and a skeleton argument from the respondent and heard oral evidence from Ms Williams and Mr U Majeed.

The applicant's case

7. Ms Williams relied on her written statements dated 10 June 2022 and 20 August 2022 and also gave oral evidence to the tribunal. The applicant contended that the written agreement she had entered into with Mr David Onafeko was a 'sham' and that her landlord was at all material time, the respondent, the registered owner of the Property.
8. In support of this assertion the applicant also relied upon the following:
 - (i) The tenancy agreement dated 1 December 2020 with Mr Onafeko which also referred to the 'landlord' and in some parts of the tenancy agreement suggested certain issues are to be raised with David Onafeko and other issues are to be raised with the 'landlord' (unnamed).
 - (ii) The applicant paid her rent to David Onafeko who was acting as an agent for the respondent particularly as he had asked for a copy of her passport for the 'landlord.'
 - (iii) Mr Onafeko had lived in the Property since 2019 and moved out in March 2022.
 - (iii) The applicant had overheard Mr Onafeko saying he would refer certain matters to the landlord and had suggested in around December 2021 to one of the other occupiers, Ms Hines, write to the landlord requesting permission to keep a dog even though he had himself given permission to Ms Hines previously to keep a dog.
 - (iv) The respondent had visited the property in around July 2021 in response to a complaint of disrepair to another occupier's faulty ensuite bathroom and she had heard him discussing the repair although she had not seen him on that occasion.
 - (v) The Property had been advertised a '5 Bedroom Flat for Rent in Streatham, Norbury' as seen in the Property Heads (Property

Social Network) document which pre-dated the applicant's tenancy.

- (vi) Witness statements from Ms Lauren Simms dated 16 August 2022 and Reyhan Akkurt dated 16 August 2022.
 - (vii) A witness statement from Mark Ross, Private Sector Housing Lead Officer for the London Borough of Merton dated 10 June 2022 confirming there was no HMO licence for the Property and no application made for one during the period 1 December 2020 and 31 March 2022.
 - (viii) Nicole Norman was named on the tenancy agreement dated 10th October 2019 along with three other tenants and remained in the property and lived in the property with the applicant when she moved in on 13 December 2020.
9. The Applicant also asserted that during her occupation that the Property had been let as a five-bedroom flat (the living room having been converted into a bedroom) and that it had been continuously occupied by five persons comprising more than two households except for approximately a week when she first moved in. At this time the Property was occupied by the applicant, David Onafeko, Ms Norman and Ms Lee with Ms Hines moving in shortly afterwards. In May 2021, Ms Norman moved out and was replaced by Ms Kear and Ms Lee was replaced by Ms Akkurt in October 2021. Ms Kear was replaced by Ms Simms. In support of her submissions on occupancy, the applicant relied upon:
- (i) The advertising of the Property as a five-bedroom flat.
 - (ii) A tenancy agreement dated 10 October 2019 made between Mr A Majood and Ioannou Nikolaidou, Marie Poulli, Nicole Yasmin Louise Norman and Jennifer Linda Mbu which although purported to be a let of a four-bedroom flat was in fact used as a five-bedroom flat due to Mr Onafeko's occupancy of the bay window room shown in advertisement photographs as a living room.
 - (iii) Witness statements from Maria Poulli dated 14 August 2022 and Ioannou Nikolaidou dated 21 August 2022 both stating that they were former tenants of the Property under a tenancy agreement made in October 2019 and during their occupancy it was used as a five-bedroom flat, Mr Onafeko also lived at the property and the landlord was Usman Majeed.
 - (iv) Witness statements from Ms Lauren Sims dated 16 August 2022 and Ms Akkurtt dated 16 August 2022 asserting there were five occupiers in the property and the respondent was the landlord.

- (v) The applicant gave oral evidence as to the occupancy of the other tenants during the relevant period which included Ms Lee, Ms Norman, Ms Hollister, Ms Hines, Reyhan Akkurt and Ms Simms as well as Mr Onafeko.
10. In support of the applicant's submission any rent repayment order should reflect the full rent paid by the applicant as evidenced by her bank statements and that no or only limited deductions should be made.

The respondent's case

11. The respondent relied upon his written statement of case dated 4 July 2022 and a witness statement dated 4 July 2022 and gave oral evidence to the tribunal. The respondent asserted that he had let the property as a four-bedroom property to Mr Onafeko; he was unaware and did not 'adopt' or condone the subletting by Mr Onafeko to the applicant and other occupiers; he did not receive any of the rent paid by the applicant; he had not authorised Mr Onafeko to act as his agent. He had understood that Mr Onafeko would occupy the property with his sister and brother. The respondent asserted he was not the direct landlord of the applicant and therefore could not be liable for a rent repayment order; *Jepson v Rakusen* [2021] EWCA Civ 1150.
12. Mr Majeed told the tribunal he knew Mr Onafeko from his previous dealings with Nelsons, the property managing agents for whom Mr Onafeko had worked and whom the respondent had employed to look after the Property.
13. In support of the respondent's argument that he was not the applicant's landlord, the respondent relied upon:
- (i) The Tenancy Agreement dated 1 November 2020 made between himself and Mr Onafeko letting the Property for a period of 12 months from 1 November 2020 at a rent of £2,900 per calendar month.
 - (ii) That he had not had any dealings with Ms Williams and had no knowledge of the occupants of the property.
14. The respondent also asserted, that in any event he had a defence of 'reasonable excuse' of being unaware of the subletting and on which he could rely and would be required to establish on the balance of probability; *I R Management Services Ltd v Salford CC* [2020] UKUT 81 (LC). Mr Majeed said that he had not given permission to sublet the property to Mr Onafeko and once he became aware there were other tenants subletting after a complaint about a dog living at the property he gave him notice to leave.

15. Mr Majeed told the tribunal that because of the Covid pandemic and his own personal circumstances he had not visited the Property on a regular basis, as he had rented it entirely to Mr Onafeko for a 12-month period and was regularly receiving the rent due from him. On the one occasion he recalled visiting the property in person, in response to the complaint about the shower, he had not gone into any other rooms and was unaware the living room had been converted into a bedroom or that there were now five tenants occupying the Property. Similarly, visits by his maintenance worker did not lead him to be apprised of Mr Onafeko's actions of sub-letting.
16. The respondent also told the tribunal the Property had been let by his brother A Majood to four tenants from 10 October 2019 for a period of 12 months and provided a copy of this tenancy agreement. He said it was a family business and he had been a landlord for 3, 4 or 5 years and the family had other properties. He said Mr Onafeko moved into the property after one of the four girls moved out. The tenancy agreement had not been amended or renewed, but this was not unusual.

The tribunal's decision

17. The tribunal finds the applicant has failed to prove beyond reasonable doubt the respondent has committed the offence of having the management or control of an HMO required to have a licence; section 72(1) Housing Act 2002 states:

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

The tribunal's findings and reasons

The 'sham' issue

18. The tribunal is not satisfied the tenancy agreement into which the applicant entered with Mr Onafeko was a sham and that the respondent was either in fact or in law her landlord against whom a rent repayment order could be made. The tribunal finds that although the wording of the tenancy agreement is ambiguous in parts, the tribunal finds, that on balance, references to Mr Onafeko and to the 'landlord' in the applicant's tenancy agreement are intended to refer to one and the same person and does not denote two different persons as asserted by the applicant.
19. The tribunal also finds the applicant was an experienced tenant and would have been aware of the details of her tenancy agreement and the identity of the person with whom she was contracting as the landlord and to whom she paid her rent. The tribunal finds the applicant did not at any time have any dealings directly or indirectly with the respondent as the 'landlord' during the relevant period.

20. The tribunal finds Mr Onafeko's references to the respondent as 'landlord' is factually and legally correct as far as the respondent was his landlord under the tenancy agreement made between him and the respondent. The tribunal finds the applicant has, in hindsight, assumed Mr Onafeko's references to 'landlord' meant a reference to the respondent as 'her landlord' although the tribunal is not satisfied this interpretation was intended or accurate.
21. The tribunal accepts the applicant's evidence other occupiers' tenancy agreements were made with Mr David Onafeko.
22. The tribunal finds that no rent was received by the respondent from the applicant in respect of her occupation of the Property and that the rent expected from Mr Onafeko was paid to the respondent when it fell due.
23. The tribunal finds that the respondent's attendance at the Property to investigate a complaint of disrepair to one of the ensuite showers was part of the respondent's obligations, as landlord vis a vis his tenancy agreement with Mr Onafeko and not as the landlord of the applicant.
24. The tribunal is not satisfied the applicant has established either the tenancy agreement with Mr Onafeko was a 'sham' agreement or that the respondent was her landlord. Consequently, the tribunal is not satisfied beyond all reasonable doubt the respondent had the management or control of a property requiring a HMO licence

The 'occupation' issue

25. The tribunal finds that the Property was let to the applicant as a five-bedroom property. The tribunal was satisfied from the evidence provided by the applicant, that the conversion of the living room into a bedroom was carried out although it is not satisfied that this was sanctioned by the respondent. The tribunal finds the advertising evidence relied upon by the parties is contradictory in this respect, with a five-bed property being advertised with photographs showing only four bedrooms.
26. The tribunal finds the witness statements of Ms Poulli and Ms Nikolaidou on which the applicant has relied, to be formulaic and contain only the most basic of information and insufficient to confirm the respondent as their landlord, particularly when the relevant agreement in October 2019, recorded A Majeed, the respondent's brother as the landlord. However, the tribunal accepts their evidence that they were previously in occupation of the Property and that Mr Onafeko also resided there. In respect of the applicant's period of occupation, the tribunal would reasonably have expected other occupiers to have given more detailed written evidence as to their occupancy of the Property particularly if they were unable to attend the oral hearing to give evidence and be cross-examined.

27. Notwithstanding the above, the tribunal finds the applicant has established the Property was occupied throughout the period for which a rent order is claimed by five occupiers, except for a period of one week during which there was a changeover of tenants.
28. Overall, the tribunal found the applicant's approach to the evidence required to establish the commission of the alleged offence to have been committed rested substantially on her own assertions and her belief they were true 'because she said so,' rather than providing evidence of other occupiers tenancy agreements, the witness statements (or copies) said to have been prepared at the request of the Local Authority with a view to a potential prosecution, although against whom was not identified.

The 'amount' issue

29. As the tribunal finds the applicant has failed to prove her claim, it is not required to make findings on the amount of the rent repayment order that would have been awarded had the application been successful.

Conclusion

29. The tribunal finds the tenancy agreement entered into by the respondent with Mr Onafeko was not a 'sham' and that the Property was sublet by Mr Onafeko to the applicant without the knowledge or permission of the respondent, who was neither the applicant's landlord nor the person having the control or management of the Property for the purpose of the alleged offence, during the relevant period. Although, the tribunal was not wholly convinced by the respondent's evidence as to what he knew and when about the occupiers in the Property, the burden of proof nevertheless falls upon the applicant who must reach the high bar of proving the offence alleged has been committed beyond all reasonable doubt. The tribunal concludes the applicant has failed in this and therefore refuses the application.

Name: Judge Tagliavini

Date: 13 February 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).